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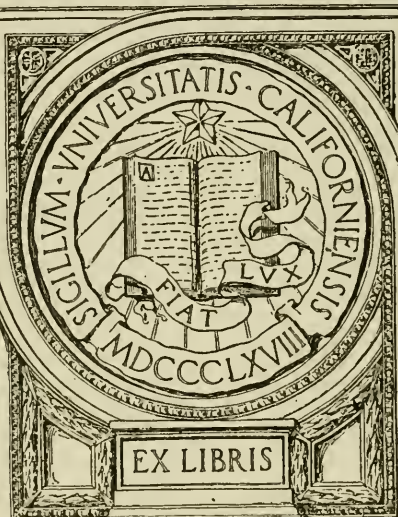
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American Courts in China

BY



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Second Inaugural Address as President of the Far Eastern
American Bar Association

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American Courts in China

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I ORIGIN

America seems to have been the first power to commission a Consul in China. The other countries do not appear to have sent theirs until after the treaty of Nanking in 1842 had opened five great ports to trade.¹ But as early as 1790 Major Samuel Shaw,² who had arrived at Canton in 1784 as supercargo of the ship *Empress*, was given a commission³ as American Consul at Canton by President Washington.

But, tho having a Consul, Americans, as well as others, found it impracticable to live and conduct business under existing native laws which were so fundamentally different from those to which they had been accustomed. The Chinese authorities, too, found it annoying, and often embarrassing, to decide questions and dispose of cases involving the rights of foreigners and desired to be relieved of the whole burden.⁴

EXTRATERRITORIALITY

The solution of this common difficulty was found in the adoption by China of the system known as "Extraterritoriality," by which foreigners were accorded the same legal status as if living in their own country, and the authorities of each treatymaking power were made responsible for punishing crime and administering justice among their own nationals.

There was, of course, nothing novel in the adoption of the system in China; for it had long been in vogue in other parts of the world. Indeed it appears to have been once in vogue everywhere. An eminent authority has recently said:

"We venture to suggest, with diffidence, that the naturalness of the extraterritorial privilege, as explained by the author, might be more emphatically illustrated by the 'personality' of all law, as distinguished from its 'territoriality,' which prevailed throughout the vast Carolingian empire till nearly 1,000 A. D.; i. e., instead of saying, with the author, that extraterritoriality was 'in accordance with usage which became generally recognized with the gradual extension of commerce,'

1. Williams, *The Middle Kingdom*, II, 567.
2. A sketch of Major Shaw and an account of the voyage appears in Asia, XVII, 13, in an article by John Ford entitled "Outward Bound."
3. Reprinted in *American Journal of International Law*, V, 426.
4. As early as 1687, it is recorded, a Chinese official suggested that an English offender in China be punished by his own nationals. Eames, *The English in China*, (London, 1909), 40.

we should prefer to believe that it was in accord with a universal prior custom prevailing in the first half of the Middle Ages."⁵

For the United States this arrangement with China was effected by the treaty⁶ signed at Wanghia, a suburb of Macao, on July 3, 1844, the eve of our sixty-eighth national anniversary and worthy to rank with events commemorated thereby.⁷ It was drafted by Caleb Cushing,⁸ afterward Attorney General of the United States, who, some eleven years later, stated the situation as follows:

"I entered China with the formed *general* conviction that the United States ought not to concede to any foreign state, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations—in a word, a Christian state. * * *

"In China, I found that Great Britain had stipulated for the absolute exemption of her subjects from the jurisdiction of the empire; while the Portuguese attained the same object through their own local jurisdiction at Macao.

"I deemed it, therefore, my duty, for all the reasons assigned, to assert a similar exemption on behalf of citizens of the United States. This exemption is agreed to in terms by the letter of the treaty of Wang-Hiya. And it was fully admitted by the Chinese in the correspondence which occurred contemporaneously with the negotiation of the treaty, on occasion of the death of Sha Aman."⁹

Article XII of the new treaty provided that

"All citizens of the United States who may commit *any crime* in China shall be subject to be tried and punished only

5. John H. Wigmore, reviewing Brown's "Foreigners in Turkey," Illinois Law Review, X, 451, Cf. Hinckley, American Consular Jurisdiction in the Orient, 17.
6. "Its fulness of details and clear exhibition of the rights conceded by the Chinese government to foreigners dwelling within its borders, made it the leading authority in settling disputes among them until 1860." Williams, The Middle Kingdom, II, 567.
7. "The treaty of Wanghia marks a transition—the end of the preparatory period and the beginning of recognized official relations between the United States and China." Latourette, Early Relations Between the United States and China, 144.
8. Curtis, The United States and Foreign Powers, (1892) 256, speaks of Cushing's selection as "most fortunate and wise." An account of his mission and of the negotiations for the treaty appears in Moore, International Law Digest, V, 416-421.
9. Opinions, Attorneys General VII, 496, 498 (September 19, 1855). "In its historical beginnings the grant of extraterritorial jurisdiction was not considered a disparagement to the sovereignty of the state that granted it. * * In the early years of Western intercourse with countries of the Far East there was less pride on the part of Oriental sovereigns in preserving their territorial jurisdiction." Hinckley, American Consular Jurisdiction in the Orient, 17, 18. Cf. Life of Sir Harry Parkes, II, 314, and see article by Charles Denby in Millard's Review, VII, 53.

by the Consul, or other public functionary of the United States, thereto authorized, according to *the laws of the United States*."¹⁰

And article XXV declared that

"All questions in regard to rights, whether of property or person, arising between citizens of the United States in China, shall be subject to the jurisdiction of, and regulated by the authorities of, their own government. And all controversies occurring in China between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing between the United States and such governments, respectively, without interference on the part of China."¹¹

II ORGANIZATION

I. THE CONSULAR COURTS

The "authorities" to which this extensive responsibility was committed were primarily the Consuls¹² and, as each Consul became thereby a Judge, the Consular Courts were thus brought into existence. For more than sixty years these, as reviewed and supervised by the Minister, were the only American Courts in China. Their jurisdiction, tho limited in one sense,¹³ covered a variety of subjects¹⁴ and questions coming before them were often of the highest importance.¹⁵

In 1906, when the United States Court for China was created, the jurisdiction of the Consular Courts was left to be exercised

"in civil cases where the sum or value of the property involved in the controversy does not exceed five hundred dollars United States money and in criminal cases where the punishment for the offense charged cannot exceed by law one hundred dollars fine or sixty days' imprisonment or both, and shall have power to arrest, examine and discharge accused persons or commit them to the said court."¹⁶

10. Malloy, *Treaties, etc.*, I, 202.

11. *Id.*, 203.

12. This was construed to include Vice-Consuls. *Opinions, Attorneys General VII*, 511.

13. "The consular court is a court of limited jurisdiction, and all the jurisdictional facts must be alleged in the libel, petition or complaint, otherwise it will be insufficient." *The Spark v. Lee, Choi Chum*, 1 Sawyer, 713, 22 Fed. Cas. 871.

14. There are several recorded cases where they granted divorces. Moore, *Int. Law Dig.* III, 459; *North China Herald*, LXIX, 1138, 1194.

15. "Cases of great importance involving large amounts of property and, in some instances, the death penalty have been adjudicated in the consular courts. The importance of some of these cases in China and Japan led to the amendment of the powers of the courts in 1870." Jones, *The Consular Service of the United States*, 55.

16. Act of June 30, 1906, 34 U. S. Stats. at Large, Ch. 3934, Pt. I, 814, sec. 2.

There are now fifteen American Consular Courts in China and it will be seen that jurisdiction retained by them is important even if limited. Especially in the probate of wills and administration of estates they are the only courts to which a considerable section of Americans in China have occasion to resort.

2. THE UNITED STATES COURT

a. History

As American interests in the Far East gradually expanded it became apparent that the important and far reaching judicial power which the nation had acquired there should be exercised, or at least supervised, by those trained especially for that purpose. Our Ministers and Consuls doubtless made the best of a difficult situation but they were laymen¹⁷ as a rule and it was not to be expected that they should find themselves at home in the technical field of law.

In 1881 Secretary Blaine, in an opinion which was transmitted to Congress by President Arthur, recommended that "men of legal training should be chosen for certain judicial offices independent of the consular system and the establishment of a separate system of courts, at least in China, with an appellate court at Shanghai." Bills embodying these recommendations were introduced into Congress in 1882 and 1884 but were not acted upon. Nevertheless the advocates of a better system continued their efforts. Consular Inspector Peirce, in his report for 1904 urged the establishment of a United States Court. In March, 1906, Congressman Edwin Denby, son of a former Minister to China, introduced his bill. It passed the lower House under his guidance, received

17. Commissioner Davis, writing in 1850, said: "Those who have to administer the law are destitute of all legal requirements." Senate Ex. Doc. 72, 1st Sess, 31st Cong. Sept, 9, 1850. Inspector Peirce, reporting in 1904, wrote: "At the present time none of our Consuls in China are trained lawyers." Jones, 'The Consular Service of the United States (1906), 52.

The present Consul General at Hankow is a lawyer, having been in active practice before entering the service, while one or more of the Vice Consuls has been admitted to the Bar. It is an encouraging sign also that others in our China consular service are now pursuing courses in legal study.

the support of Senators Lodge and Spooner in the Upper Chamber and became a law on June 30, 1906.

Elsewhere Mr. Denby has said of the conception and purpose of his measure :

"I thought of our United States Judge as much in the light of an ancillary, unofficial ambassador of the United States, as of a Judge of a court for the trial of cases in which Americans were concerned. I had hoped at that time, judging of conditions as I had known them before, that this high judicial officer, the highest American official in the land next only to the Minister, unhampered by diplomatic restrictions and with an eye single to the best interests of the Chinese Empire and of the United States, might, having placed himself on terms of friendship and confidence with the chief officials of the Empire, exercise in an entirely unofficial way a considerable influence in matters affecting foreign relations. The Court's sittings were to be at the points indicated—four great vice-regal seats—and I hoped that perhaps some good might be accomplished through the influence of the Court in an entirely unofficial and friendly way, relying upon the Judge himself to exercise tact and discretion and to use whatever influence he might acquire in the best manner." ¹⁸

While nominally established by the act of June 30, 1906, the court was not actually opened for business until early in 1907. Of the more than seven hundred causes which have come before it since then, there have been many of unusual importance either in the legal questions arising or in the amounts involved.

b. Jurisdiction

A court's jurisdiction may be considered under three aspects: (1) territorial, (2) personal and (3) topical, which last is known in technical parlance as "jurisdiction of the subject matter." The latter is again subdivided into (a) original, (b) appellate and (in this instance) (c) supervisory.

(1) *Territorial* jurisdiction of this United States Court extends to, and its process runs thruout, all Chinese territory. Sessions of the court are held almost continuously at Shanghai and one regular term is held each year at Tientsin in the north, Hankow in central China and Canton in the south. Special sessions are authorized at any place in China having an American Consulate. The Organic Act also conferred jurisdiction in Korea but, while this provision has never been repealed, the jurisdiction has not been exercised in recent years. Should the government ever decide to extend the court's jurisdiction to Siam, where extrater-

18. Far Eastern American Bar Association Publications, I, 14, 15.

ritoriality was granted in 1856,¹⁹ it would require no more than the addition of a couple of words to the Organic Act and the slight expense of a yearly session at Bangkok.

(2) *Personal*. The test of jurisdiction over the person in all these extraterritorial courts is the nationality of the defendant. Anyone may be a plaintiff but there must be a defendant subject to American authority in order to confer jurisdiction. This includes Filipinos, of whom there are many in China, and also Porto Ricans, as well as regular American citizens, and all such in China are amenable to these courts in any cause, criminal or civil, which many be instituted therein against them. And where the cause is what is technically known as *in rem*—concerns property or status alone—it may be brought in these courts tho there is no such defendant or even where the nominal defendant is an alien.²⁰

(3) *Topical*: (a) *Original* jurisdiction of the subject matter is exercised by the United States Court in all cases arising within its territory which are not cognizable by the Consular Courts—i. e. in all civil cases where the amount involved *exceeds* five hundred dollars and in all criminal cases where the penalty prescribed *exceeds* “one hundred dollars fine or sixty days’ imprisonment or both.”²¹ It sometimes happens, especially in administration matters, that a cause is commenced in a Consular Court under the belief that it involves less than five hundred dollars, and is afterward found to involve more. In that event it is transferred to the United States Court and the prior proceedings are treated as having been conducted under its authority.²² The grant of jurisdiction in “all civil cases” of the prescribed amount is an extensive one and includes proceedings of every recognized class without limit as to the maximum amount or character of relief sought. Thus while the United States Court for China is a part of the Federal Judicial system,

19. Treaty of May 29, 1856, Malloy, Treaties etc. 1, 1629.

20. See *Richards v. Richards*, U. S. Court for China, No. 424, where the defendant was a Chinese woman but the object of the action was divorce without alimony—i. e. change of status only.

21. 34 U. S. Stats. at Large, Ch. 3934, sec. 2.

22. In re Jaeger's Estate (April 26, 1918), U. S. Court for China No. 613, Millard's Review, 1V, 374.

corresponding in grade mainly to the District Courts, it has cognizance of certain causes (such as probate, divorce, guardianship and adoption) which, in America, are entertained only by the state courts. The amounts involved likewise are often very large, running into hundreds of thousands.

(b) *Appellate*: All judgments of the Consular Courts are subject to review by the United States Court for China on appeal²³ while from the latter, which is considered as located in the ninth judicial circuit, appeals lie to the Court of Appeals sitting at San Francisco.

(c) *Supervisory*: But besides its ordinary appellate cognizance the United States Court also exercises a supervisory or administrative jurisdiction in all probate and administration causes whether appealed or not. Thus it is provided that the Consular Judge

"shall pay no claims against the estate without the written approval of the judge of said (United States Court) court, nor shall he make sale of any of the assets of said estate without first reporting the same to said judge and obtaining a written approval of said sale," etc.²⁴

The latter is also empowered,

"to require at any time reports from consuls or vice-consuls in respect of all their acts and doings relating to the estate of any such deceased person".²⁵

The statute further provides:

"That the procedure of the said Court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States: Provided, however, that the Judge of the said United States Court for China shall have authority from time to time to modify and supplement said rules of procedure."²⁶

The relation between the two is, therefore, something more than that usually existing between appellate and *nisi prius* courts. What Congress apparently

23. Formerly appeals lay to the minister in cases involving \$2500, or less; if more the appeal lay to the Federal Circuit Court in California. See *The Ping On v. Blethen*, 11 Fed. 602, where the court says:

"The whole statute upon the subject of the consular and ministerial courts of China and Japan must be construed together, and, if possible, so that there shall be no conflict between its various provisions. A complete and harmonious system for the exercise of appellate jurisdiction from those courts has been provided, and sections 4092 and 4093 prescribe the jurisdiction."

24. Act of June 30, 1906, 34 U. S. Stats. at Large, Ch. 3934, Pt. I. §14, sec. 2.

25. *Id.*

26. *Id.* sec. 5.

intended by this, particularly as regards probate and administration matters, was the creation of an office resembling the "Chief Judicial Superintendent" of the up to date law reformers, who is invested *inter alia* with the rule-making function. Indeed Mr. Cushing seems to have had this idea in mind when he wrote, a half century earlier,

"I think it is the theory of the statute, and a good one, to give to the commissioner, in ordinary judicial matters, at common law, only a regulative, appellate, and *superintending authority*, devolving the original jurisdiction in such cases upon the resident consuls."²⁷

John H. Wigmore, the leader of advanced legal thought in America, expresses²⁸ this conception as follows:

"What we preach⁹ is a Chief Judicial Superintendent, who shall have the power and the duty to inquire into each and every sort of botch-product of our justice-system, and to take measures to improve it against the recurrence of such failures. When the people bring themselves to permitting and demanding such an innovation, they will be in a fair way of getting substantial improvements in their justice—but not before then."

Thus, to Mr. Denby's conception of an "unofficial Ambassador" must be added that of Dean Wigmore's "Judicial Superintendent"²⁹ if we would comprehend the purposes which underlay the creation of the United States Court for China. How far these purposes have been carried out is not, of course, for those administering the Court to say; but the latter can the better be assisted by their own nationals in attaining said purposes, if these are clearly understood and if all unite in seeking their achievement.

For both United States and Consular Courts exist in order to serve Americans in China and those who deal with them. The measure of their success is the degree of serviceability attained and it should be inspiring to find that their founders anticipated and applied an ideal which is only just now being diffused by the most advanced school of law reformers in America.

27. Opinions, Attorneys General, VII, 507.

28. Illinois Law Review, XI, 49.

29. "Further reflection is removing some of the initial prejudice against Dr. Wigmore's 'Judicial Superintendent.'" Law Notes, XXII, 103 (September, 1918).

III JURISPRUDENCE AND LEGISLATION

1. "*Laws of the United States*"a. *State Laws not Extended*

The essence of extraterritoriality is the extension of law beyond the country wherein it originated. Each nation necessarily determines for itself what laws are thus extended; but in the case of the United States the process is complicated by the coexistence of two systems of law—State and Federal—which often differ considerably. Congress might have met the situation by extending the laws of a particular state over American citizens in China. Similar extensions had been made by it before and have been made not infrequently since. Thus, in providing a legal system for the then new Federal District of Columbia, Congress had enacted as early as 1801:

"That the laws of the state of Virginia, as they now exist, shall be and continue in force in that part of the District of Columbia, which was ceded by the said state to the United States, and by them accepted for the permanent seat of government; and that the laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States, and by them accepted as aforesaid."³⁰

Again in 1825 Congress "extended the criminal laws of each state over all Federal territory and property within its boundaries,"³¹ thus making a violation of such state law an offense against the United States."³² So "the laws of Iowa were extended over the newly formed territory of Nebraska in 1855" while "in 1884, the laws of Oregon" were "extended over Alaska."³³ In 1890 the laws of Nebraska were extended over the territory of Oklahoma,³⁴ then recently organized, while the same act extended over the Indian Territory "certain general laws of *** Arkansas *** not locally

30. Act of Congress of February 27, 1801, 2 U. S. Stats. at Large, p. 103. This is of interest here because thru it, and the later extension of the Columbian code, some old Maryland laws have come into force in China.

31. Act of Congress of March 3, 1825, 4 U. S. Stats. at Large, p. 115.

32. U. S. ex rel Raven v. McRae, U. S. Court for China, No. 586; Millard's Review, I, 7; Biddle v. U. S. 156 Fed. 759, 763.

33. U. S. ex rel. Raven v. McRae, U. S. Court for China, No. 586, Millard's Review, I, 7.

34. Act of Congress of May 2, 1890, 26 U. S. Stats. at Large, Ch. 182, sec. 11.

inapplicable or in conflict with this Act or with any law of Congress" etc.³⁵

But instead of pursuing this policy in exercising the then recent grant of extraterritorial jurisdiction in China, Congress enacted in 1848 that

"Such jurisdiction in criminal and civil matters shall in all cases, be exercised and enforced in conformity with the *laws of the United States*, which are hereby, so far as is necessary to execute said treaty, extended over all citizens of the United States in China (and over all others to the extent that the terms of the treaty justify or require), so far as such laws are suitable to carry said treaty into effect."³⁶

In 1860 a more elaborate act³⁷ was passed in which the foregoing section was, almost literally, repeated, so that it affords the basis of American jurisprudence in China.

b. *Meaning of the Phrase*

Attorney-General Cushing appears to have been the first to construe this provision. In his now celebrated opinion³⁸ he speaks of

"The *laws of the United States*, comprehending the Constitution, treaties, acts of Congress, equity and admiralty law, and the law of nations, public and private, as administered by the Supreme Court, and Circuit and District Courts of the United States, and, in certain cases, regulations of the Executive Departments."

But this interpretation must now be qualified in some respects. The Federal Constitution has since been declared³⁹ to have no extraterritorial force. The "law of nations" was probably operative in China before the passage of the act referred to. The phrase "laws of the United States" is narrowed down to mean "principally, therefore, the Acts of Congress then or subsequently in force."⁴⁰

But Acts of Congress, like the Federal Constitution⁴¹ itself, are of two classes, *viz.* those of general application and those of limited or local application.

35. Act of Congress of May 2, 1890, 26 U. S. Stats. at Large, Ch. 182 sec. 31. These laws were treated as Acts of Congress equally as if they had been enacted by it *in hac verba*. In re Grayson, 3 Indian Ter. 497 (1901).

36. Act of Congress of August 11, 1848, 9 U. S. Stats. at Large, 276 sec. 4. "The law was passed in reference to this treaty and to that with the Ottoman Porte." *Dainese v. Hale*, 91 U. S. 13, 23 Law. ed. 190.

37. 12 U. S. Stats. at Large, 73, sec. 4.

38. Opinions, Attorneys General, VII, 503 (1855).

39. "The constitution can have no operation in another country." In re Ross, 140 U. S. 433, 464, 35 Law ed. 581. Cf. *Dorr v. U. S.*, 195 U. S. 138, 49 Law ed. 128; *Downes v. Bidwell*, 182 U. S. 244, 45 Law ed. 1088.

40. *U. S. v. Allen*, U. S. Court for China, No. 89.

41. *Tan Te v. Bell*, *Philippine Law Rev.* 1, 118, 123, 124.

c. General Acts of Congress

It has never been questioned that the former were extended over Americans in China by the Act above quoted. But they were of least importance here because they deal with subjects (mostly of public law) not directly affecting the ordinary American citizen residing in this part of the world. In Attorney General Cushing's day there were few Acts of Congress at all applicable to China which were not of the general class and he could well say that

"the Federal legislation does not include these matters—the great mass of civil or municipal duties, rights and relations of men—and of itself would be of no avail towards determining any of the questions of property, succession or contract which constitute the staple matters of ordinary life."⁴²

Since this was written some general Acts of Congress relating to these subjects have been passed. Notable among these is the Federal Penal Code⁴³ which, tho far from covering the whole subject of criminal law, affords at least a groundwork, of which other legislation, presently to be noticed, is suppletory, and which is always applied primarily.⁴⁴ But for the most part it remains true that American Courts in China find in the general Acts of Congress little to assist them in connection with contracts, domestic relations and other branches of private law with which they have had most to deal.

d. Special Acts

Shortly before the establishment of the United States Court for China, Congress had enacted for various jurisdictions a series of fairly satisfactory codes and statutes, covering such and kindred subjects.⁴⁵ And

42. Opinions, Attorneys General VII, 503.

43. Act of Congress of March 4, 1909, 35 U. S. Stats. at Large, ch. 321.

44. U. S. v. Diaz, Nos. 678, 679, Millard's Review, VI, 167; Ezra v. Merriman, No. 701; Millard's Review, VI, 463.

45. Act of March 3, 1899, 30 U. S. Stats. at Large, 1253 et seq. (Criminal Code for Alaska).

Act of June 5, 1900, 31 U. S. Stats. at Large, ch. 786 (Civil Laws for Alaska).

Act of March 3, 1901, 31 U. S. Stats. at Large, ch. 854 (General Code for the District of Columbia).

Act of July 1, 1902, 32 U. S. Stats. at Large, ch. 1369 (Organic Act for the Philippines but, with its successor, containing provisions which may prove useful in China). This was supplemented, tho not entirely repealed, by the Act of Aug. 29, 1916, 39 U. S. Stats. at Large, ch. 416, known as the "Jones Law."

these local and limited acts, quite as much as the general ones, are "laws of the United States" as that phrase is used in the extending act. For the phrase is not original with that act. It is found, as we have seen, in the treaty of 1844, and, long before that, in the Federal Constitution⁴⁶ of 1787. As used in the latter it was construed by Chief Justice Marshall, as early as 1821, to include an act relating to the District of Columbia alone. In rejecting the contrary contention that great jurist said:

"Those who contend that acts of Congress, made in pursuance of this power, do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of congress, as the legislature of the Union, is not a law of the United States, and does not bind them."⁴⁷

This doctrine has since been followed by the Supreme Court⁴⁸ and by the lower Federal Courts.⁴⁹ In

46. Art. VI.

47. Cohens v. Virginia, 6 Wheat. (U. S.) 264, 424, 425.

48. Parsons v. District of Columbia, 170 U. S. 45, 42, Law ed., 943.

In construing the statute (36 U. S. Stats. at Large, ch. 1369 sec. 10) regulating appeals from the Philippines, the Supreme Court declared the Philippine Tariff Act, which applied to the archipelago alone, "a statute of the United States." *Gsell v. Insular Collector*, 239 U. S. 93; affirming 24 Philippine, 369, which in turn affirmed the decision of *Lobingier J.* reported in *Philippine Law Review* 1, 229-233.

It is true that the phrase "law of the United States" as used in one paragraph of section 250 of the Judicial Code relating to appeals has been construed as not including an Act of Congress for the District of Columbia. *American Security etc. Co. v. District of Columbia*, 224 U. S. 491, 56 Law. ed. 856, 32 Sup. Ct. 553; *Washington etc. R. Co., v. Downey*, 236 U. S. 190, 59 Law. ed. 533, 35 Sup. Ct. 406; *American Surety Company v. American Fruit Products Company*, 238 U. S. 140, 59 Law. ed. 1238; 35 Sup. Ct. 828; *American Security etc. Co. v. Rudolph*, 38 App. Cas. (D. C.) 32.

But the *ratio decidendi* was the declared purpose of the paragraph to limit appeals. (*American Security etc. Co. v. District of Columbia*, 224 U. S. 491, 56 Law. ed. 856, 32 Sup. Ct. 553.) And it was conceded that the same phrase in another paragraph might be construed differently.

"Of course there is no doubt that the special Act of Congress was in one sense a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section; 'Cases involving the constitutionality of any law of the United States.'" *Id. Cf. American Surety Company v. American Fruit Product Company*, 238 U. S. 140, 59 Law. ed. 533, 35 Sup. Ct. 406.

49. "Such laws (of the District of Columbia) are as much laws of the United States as tho their application was to the whole country." *In re Wolf*, 27 Fed. 606, 612 (Parker J.)

reviewing a prosecution originally brought in the United States Court for China, and in upholding that court's jurisdiction of such a crime, the Court of Appeals for the ninth judicial circuit said :

" It is true, there is no general statute applicable to every state in the Union, making this an offense against the United States ; nor could there be, in view of the fact that under our system of government the right to punish for such acts committed within the political jurisdiction of the state is reserved to the several states. But in legislating for territory over which the United States exercises exclusive legislative jurisdiction, Congress has made the act of obtaining money under false pretenses a crime. * * * In view of the legislation of Congress to which we have referred (the acts relating to Alaska and the District of Columbia, and the statute of July 7, 1898), our conclusion is that obtaining money or goods under false pretenses is an offense against the laws of the United States, within the meaning of the statute conferring jurisdiction upon the United States Court for China." ⁵⁰

This is the doctrine now regularly applied by the last named Court which has declared that the

" extension results quite independently of the original purpose of the acts themselves. Thus Congress may enact a law for a limited area under its inclusive jurisdiction, such as Alaska or the District of Columbia ; by its terms it may have no force whatever outside of such area ; but if it is ' necessary to execute such treaties ' (with China) and ' suitable to carry the same into effect ' it becomes operative here by virtue of the act of 1860 above quoted. Such we understand to be the doctrine announced by the Court of Appeals." ⁵¹

Tho the acts construed in the two preceding causes related to crimes the fundamental basis of the decision applies equally well to civil laws which have since been treated by the United States Court for China ⁵² as extended here.

" For there can be no half way adoption of that doctrine ; it includes all such laws or none. It cannot logically be restricted to any particular class of acts. It is just as applicable to civil laws as to criminal ; just as necessary in respect to corporations as to procedure." ⁵³

It sometimes happens, of course, that Congress has passed acts, covering the same subject, for more than one jurisdiction. Where these are *equally suitable* the court applies a rule of statutory construction as old

50. Biddle v. United States, 156 Fed. 759, 762, 763.

51. U. S. v. Allen, U. S. Court for China No. 89.

52. Cavanaugh v. Worden, No. 313, Millard's Review V, 162

53. U. S. ex rel. Raven v. McRae, U. S. Court for China, No. 586, Millard's Review I, 9.

as the Twelve Tables⁵⁴ and adopts the later enactment.⁵⁵

Theoretically the later legislation should be the better; but in practice, unfortunately, such is not always the case. Thus as between the Alaskan and Columbian Codes, both enacted by the same Congress, the former, which is a few months the earlier, having been drafted for a sparsely settled, frontier community, is, on the whole, better suited to conditions in China than the latter, tho each contains desirable features not found in the other. To meet that situation and at the same time to secure legislative confirmation of the judicial doctrine above set forth the writer drafted the following as the first section of the bill⁵⁶ now pending before Congress "to supplement existing legislation relative to the United States Court for China and to increase the serviceability thereof":

"The laws of the United States which, so far as necessary and suitable, are, by section four thousand and eighty-six of the Revised Statutes, extended over American citizens in China, shall be understood as including all applicable treaties and Acts of Congress; and whenever its general Acts are deficient in the particulars mentioned in said section, the legislation enacted by Congress for the Territory of Alaska shall be considered as so extended, and in case the same is deficient, then the legislation so enacted for the District of Columbia."

In addition to local laws enacted for other jurisdictions and extended here, there are some which were passed especially for China and are still in force. Such was the Act of 1848, already noticed, the Act of 1887 penalizing the opium traffic by Americans in China,⁵⁷ the act of 1906 creating the United States Court for China⁵⁸ and the Act of 1915 regulating the practice of pharmacy by Americans in China.⁵⁹

In 1913 Alaska was provided with a legislature of its own, but Congress will doubtless continue to legislate indefinitely for the District of Columbia and a fair supply of new legislation may be expected from

54. XII, 5; Cyc. XXXVI, 1130.

55. *Cavanaugh v. Worden*, No. 313, Millard's Review, V, 162.

56. H. R. 10243, 65th Congress (2nd Session).

57. 24 U. S. Stats. at Large, 409; Suppl. U. S. Rev. Stats. Vol I, Ch. 210.

58. 34 U. S. Stats. at Large, ch. 3934.

59. 38 U. S. Stats. at Large, p. 817.

that source.⁶⁰ The statutory equipment of American Courts in China is therefore, on the whole, about as complete as that of most courts, and it is the only tribunal, sitting outside the District of Columbia, which applies exclusively Federal legislation.

2. *Unwritten Law*

a. *The Common Law*

In any jurisdiction there are, of course, many subjects not covered by legislation; and these *lacunae* were early provided for in the American law for extra-territorial countries by enacting that

"in all cases where such laws (of the United States) are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, *the common law* shall be extended in like manner over such citizens and others in the said countries."⁶¹

So the Act establishing the United States Court for China provides,⁶²

"in all such cases when such laws are deficient in the provisions necessary to give jurisdiction or to furnish suitable remedies, *the common law and the law as established by the decisions of the courts of the United States*"⁶³ shall be applied by said court in its decisions and shall govern the same subject to the terms of any treaties between the United States and China."

Attorney-General Cushing, in the opinion already quoted from, referred as follows to that part of the first provision above quoted relating to the common law:

"For such of the States as were founded in whole or chief part by colonists from Great Britain and Ireland, or their descendants, the law of England, as it existed in each of those States at the time of their separation from Great Britain, with such modifications as that law had undergone by the operation of colonial adjudication, legislation, or usage, became the common law of such independent State.

60. A notable instance is the Negotiable Instruments Law (Act of Congress of January 12, 1899, 30 U. S. Stats. at Large, ch. 47). Other products of the Uniform Laws Conference may be forthcoming. The marriage law of the District of Columbia was partly extended to foreign countries by the act of 1860 (U. S. Rev. States. Sec. 4082) and the necessarily larger use hereafter in China of legislation enacted for said District will but carry out the ideas of Consular Inspector Peirce who, in his report for 1904, urging the establishment of the United States Court, recommended that it should apply "to supplement the Federal Statutes, the laws of the District of Columbia." Jones., *The Consular Service of the United States* (1916), 58.

61. Act of Congress of Aug. 11, 1848, 9 U. S. Stats. at Large, 276, Ch. 150, sec. 4.

62. Act of Congress of June 30, 1906, 34 U. S. Stats. at Large, Ch. 3934.

63. This necessarily gives the Federal decisions precedence over all others.

Meantime, in addition to many changes, differing among themselves, which the common law underwent in each of the colonies before it became a State, that common law has been yet more largely changed by the legislation and judicial construction of each of the States.

Hence, it was not enough to enact that the common law should intervene to supply, in China, deficiencies in the law of the United States. For the question would be sure to arise: What common law? The common law of England at the time when the British colonies were transmuted into independent republican States? Or the common law of Massachusetts? Or that of New York, or Pennsylvania, or Virginia? For all these are distinct, and in many important respects diverse, "common law."⁶⁴

It is well settled that "there is no common law of the United States as distinguished from (that of) the individual states" *i. e.* no "national customary law, distinct from the common law of England as adopted by the several states each for itself."⁶⁵ There is authority, however, for the view that the first answer suggested by Mr. Cushing is the correct one. Thus,

"This common law, on which the constitution is predicated, necessarily is not a compound of the law, as it applied in the several states at the adoption of the constitution, because the original had undergone changes by local usage and adjudication, in the process of its adaptation to colonial conditions. Necessarily it is that unit of law, which prevailed in England—the English common law proper. And it was that law, as it stood manifested by English decisions, *at the date of the Declaration of Independence*, because till then appeals lay from the colonial courts to the King's bench, and from that tribunal to the House of Lords, where controlling decisions became, down to that period, the authoritative exposition of the law, and its conclusive evidence."⁶⁶

Several tribunals have construed, on the whole similarly, this Act of Congress which extends the "common law" to China. The first, a state court, observed:

"We understand by the 'common law,' as used in the Act of Congress, and applied to the arbitrament of controversies between citizens of the United States, that general body of law, which, as Judge Marshall expresses it, is constituted 'by those general principles and those general usages which are to be found, not in the legislative Acts of any particular State, but that generally recognized and long established law which forms the substratum of the laws of every State,' *i. e.* every State carved out of the British Colonies. We may look to American as well as English books, and to American as well as English jurists, to ascertain what this law is, for neither the

64. Opinions, Attorneys General, VII, 503. Cf. the remark of Secretary Fish quoted in Moore, *International Law* Dig. 11,619.

65. *Corpus Juris*, XII, 196 and numerous citations.

66. *Ware v. Wanless*, 2 Wyoming, 144, 152.

opinions nor precedents of Judges can be said, with strict propriety, to be the law—they are only evidence of law.”⁶⁷

In the United States Court for China the phrase has been

“interpreted to mean those principles of the common law of England and those statutes passed in aid thereof, including the law administered in the equity, admiralty and ecclesiastical tribunals, which were adapted to the situation and circumstances of the American colonies *at the date of the transfer of sovereignty* as modified, applied and developed generally by the decisions of the United States courts, and incorporated generally into the statutes and constitutions of the States.”⁶⁸

Finally the Court of Appeals, in reviewing the case last cited, expressed the opinion that

“in making the common law applicable to offenses committed by American citizens in China, and the other countries with which we have similar treaties, Congress had reference to the common law in force in the several American colonies *at the date of the separation* from the mother country, and this included not only the ancient common law, the *lex non scripta*, but also statutes which had theretofore been passed amendatory of or in aid of the common law.”⁶⁹

But, as was observed by one who had experienced in a practical way the difficulties of which he spoke,

“Just think what this means. It means that where the statutes of the United States are deficient or not suitable the Court must ascertain the common or unwritten law in force in the colonies prior to the Declaration of Independence, and if successful, attempt to apply it to modern conditions in China. The Judges of the Court of Appeals must have felt some amazement at the situation.”⁷⁰

b. Equity

The statute of 1860 added after the words “the common law,” the phrase “including equity and admiralty”⁷¹ and such inclusion as to equity has other sanction.⁷² But equity in the United States has had a development independent of that of the common law. The equity jurisdiction of the Federal Courts

67. *Forbes v. Scannell*, 13 California, 242, 285 (1859) construing an assignment originally confirmed by the American Consul at Canton.

68. *Willfey, J.* in *U. S. v. Biddle*, American Journal of International Law, 1, 793, 796; reversed on another point, 156 Fed. 759.

69. *Biddle v. United States*, 156 Fed. 759, 762.

70. *Stirling Fessenden* in *Far Eastern American Bar Association Publications* 1, 23.

71. Act of Congress of June 22, 1860, 12 U. S. Stats. at Large, p. 73. Ch. 179, sec. 4; Rev. Stats., sec. 4086.

72. “The English common law in the enlarged sense, as embracing law and equity became, by the principle of colonization, the fundamental jurisprudence of the American colonies.” *Ware v. Wanless*, 2 Wyoming, 144, 152.

e. g., and their mode of administering it, is uniform thruout the country⁷³ and while it would probably be overstating to speak of a Federal "equity jurisprudence" it is nevertheless true that no American tribunals have applied so extensively the system developed by the English High Court of Chancery as have the Federal Courts.

c. Admiralty

The third branch of the unwritten law specified in the statute of 1860, is administered in the United States by the Federal Courts exclusively⁷⁴ and state legislation has no effect on either the procedure or the jurisprudence,⁷⁵ which is substantially the maritime law of the whole Western world.⁷⁶ This branch therefore presents none, and equity not so many, of the difficulties resulting from the extension of the "common law" in its restricted sense.

3. *The Rule-Making Authority*

a. Commissioner and Minister

The Act of 1848 finally provided :

"If defects still remain to be supplied, and neither the common law nor the statutes of the United States furnish appropriate and suitable remedies, the commissioner shall, by decrees and regulations which shall have the force of law, supply such defects and deficiencies."⁷⁷

Attorney-General Cushing saw in this the remedy for the difficulties already noticed in applying the "common law."

"This power of supplementary decree or regulation," he said,⁷⁸ "serves to provide for many cases of criminality, which neither federal statutes nor the common law would cover."

The Act further provided :

"That, in order to organize and carry into effect the system of jurisprudence demanded by said treaty, the commis-

73. See the writer's article "Equity," *Am. & Eng. Encyc. of Law* (2nd ed). XI, 155.

74. Federal Const., Art. III, sec. 2; Federal Judicial Code (1911) sec. 24, cl. 3; sec. 256, cl. 3, 4.

75. *The Chusan*, 2 Story, 455, 5 Fed. Cas. 680, 682.

76. *Corpus Juris*, I, 1251 (51).

77. Act of Aug. 11, 1848, 9 U. S. Stats. at Large, 276, Ch. 150, sec. 4.

78. *Opinions, Attorneys General*, VII, 504.

sioner, with the advice of the several consuls for the five ports named in said treaty, or so many of them as can be conveniently assembled, shall prescribe the forms of all processes which shall be issued by any of said consuls; the mode of executing and the time of returning the same; the manner in which trials shall be conducted, and how the records thereof shall be kept; the form of oaths for Christian witnesses, and the mode of examining all other witnesses; the costs which shall be allowed to the prevailing party, and the fees which shall be paid for judicial services to defray necessary expenses; the manner in which all officers and agents to execute process, and to carry this act into effect, shall be appointed and compensated; the form of bail bonds, and the security which shall be required of the party who appeals from the decision of a consul; and generally, without further enumeration, to make all such decrees and regulations from time to time, under the provisions of this act, as the exigency may demand; and all such regulations, decrees, and orders shall be plainly drawn up in writing, and submitted, as above provided, for the advice of the consuls, or as many of them as can be consulted without prejudicial delay or inconvenience, who shall each signify his assent or dissent in writing, with his name subscribed thereto; and after taking such advice, and considering the same, the commissioner may, nevertheless, by causing the decree, order, or regulation, to be published with his signature thereto, and the opinions of his advisers inscribed thereon, (make it) to become binding and obligatory until annulled or modified by Congress, and it shall take effect from the publication or any subsequent day thereto named in the act." 70

And

"That all such regulations, orders, and decrees shall, as speedily as may be after publication, be transmitted by the commissioner, with the opinions of his advisers, as drawn up by them severally, to the President, to be laid before Congress for revision." 80

The first to exercise this extensive and important function was Commissioner Davis.⁸¹ As early as 1850 he framed a set of rules and the difficulties under which he labored are apparent from his description.

"In draughting these regulations and forms," he says,⁸²

"I had to encounter great embarrassment, consequent on my limited knowledge of law and forms . . . I was left solely to my own resources. Nor was I able to find in all China, Hongkong, Macao or the Philippines, either an American lawyer, or an American law book, with the exception of the Statutes at Large and Kent's Commentaries."

Surely under such conditions it is remarkable that any results whatever were attained. The task thus

79. Act of August 11, 1848, 9 U. S. Stats. at Large, p. 276, Ch. 150, sec. 5.

80. Id. sec. 6.

81. Jones, *The Consular Service of the United States* (1906) 51.

82. Senate Ex. Doc. 31st. Cong. 1st Sess., Doc. 72, September 9, 1850.

begun by Commissioner Davis was, however, soon undertaken by another whose work has been described as follows :

"On the second of October, 1854, Robert M. McLane, being the United States Commissioner to China, with the advice of the United States Consul, issued a decree distributing the judicial power, by which jurisdiction was vested in the Consular Court over equity matters, trusts, etc. After enumerating the heads of jurisdiction, this regulation proceeds: 'As to trusts, equity will superintend and protect the creation of trusts, whether vesting in the trustee real or personal estate, and take jurisdiction of trusts, whether resulting from an express deed or the force of circumstances and situation of the parties, which latter are implied trusts.' It will thus be seen that the Commissioner and Consuls constitute a judiciary for the government of the citizens of the United States in China, and as such, and when so acting, are governed by the law of nations, the laws of the United States, the common law, and the decrees and regulations of the Commissioner, until the latter are modified or annulled by Congress."⁸³

And Attorney General Cushing seems to have been quite within the truth when he wrote, the following year :

"In certain respects, therefore, the commissioner legislates for citizens of the United States in China; it being required, meanwhile, that such 'regulations, orders, and decrees,' as he may make in the premises, shall be transmitted to the President, to be laid before Congress for its revision."⁸⁴

When the Commissioner gave place to the Minister the latter continued to exercise this legislative power and rather extensive court regulations,⁸⁵ repealing prior ones, were put in force by Minister Burlingame in 1864 while both Ministers Angell⁸⁶ in 1881 and Denby⁸⁷ in 1897 made additions. But at best they were far from complete or even satisfactory as to the ground covered and Judge Thayer could well say

"The Court has not overlooked the fact that many of these regulations are gravely defective. It may well be that Congress so regarded them as it has given to the judge of this Court authority to modify and supplement such rules of procedure."⁸⁸

83. *Forbes v. Scannell*, 13 Cal. 242, 281 (1859).

84. *Opinions, Attorneys General*, VII, 504.

85. They are reprinted in Hinckley's *American Consular Jurisdiction in the Orient* (1906) pp. 226-235.

86. *Id.*, 235, 236.

87. *Id.*, 236.

88. *U. S. v. Engelbracht*, (U. S. Court for China No. 33), *American Journal of International Law*, III, 735, 745.

b. Judge of the United States Court

The Act establishing the United States Court for China contains the following provisions relative to this branch of our subject :

"The procedure of the said court shall be in accordance, so far as practicable, with the existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States : Provided, however, That the judge of the said United States Court for China shall have authority from time to time to modify and supplement said rules of procedure. The provisions of sections forty-one hundred and six and forty-one hundred and seven of the Revised Statutes of the United States allowing consuls in certain cases to summon associates shall have no application to said court." 89 * * * *

"The tariff of fees of said officers of the court shall be the same as the tariff already fixed for the consular courts in China, subject to amendment from time to time by order of the President, and all fees taxed and received shall be paid into the Treasury of the United States." 90

The first of these confirms and continues in force the old consular court rules with all their defects and it has even been held ⁹¹ that they prevail over Acts of Congress relating to the same subject. But that provision likewise offers a remedy for such defects (which as Judge Thayer suggests ⁹² Congress thus appears to recognize) by authorizing the Judge of the United States Court "to modify and supplement said rules." This necessarily includes the authority to displace old rules with new so that in course of time the latter may entirely supersede the former.

A communication to the minister from the Department of State in 1917 announces

"that the Department is clearly of the opinion that section 5 of the act of June 30, 1906, should be construed as effecting a transfer of the authority to modify and supplement existing rules of procedure from the minister to the United States Court for China."

But this rule-making function of the United States Court derives not alone from the statute ; it is inherent in all courts ⁹³-at least those of record.

89. Act of Congress of June 30, 1906, 34 U. S. Stats. at Large, Ch 3934, sec. 5.

90. Id., sec. 9.

91. U. S. v. Engelbracht, (U. S. Court for China, No. 33), American Journal of International Law, III, 735, 745, per Thayer, J.

92. Id. 745.

93. Cyc. XI, 740 (21) ; Bartholomew v. Carter, 3 M. & G., 125 (1841).

"I hold, therefore, that Rule XV of the Regulations of 1864, while not to be regarded as having the authority or the fixedness of a statute, is to be viewed as a rule of court expressing a principle open to modification by the court that issued it. It stands in the same position as do the equity rules adopted by the Supreme Court of the United States and courts of the several States, not as a statutory mandate, to remain in force until expressly repealed or modified, but as a principle and regulation of practice which it is open to the court to expand or vary as the purposes of justice may require."⁹⁴

This function has been most thoroly developed in England where a committee of judges frames and amends all rules with a consequent "gain in flexibility * * from entrusting the regulation of civil procedure to a professional body rather than to a well intentioned but overworked legislature."⁹⁵ The new school of law reformers in America sees in the larger employment of this function a remedy for many defects in our procedural system which too often cause technicality to prevail over justice.⁹⁶ The American Judicature Society, organized in 1913 "to promote the efficient administration of justice," has championed the idea⁹⁷ and its first draft of "a State-wide Judicature Act" provides for a council of judges "to make, alter

94. Secretary Bayard to Minister Denby, April 27, 1887, Moore Int. Law Dig. II, 621.

95. Rosenbaum, *Studies in English Civil Procedure*, University of Pennsylvania Law Rev., LXIII, 151, 273, 380, 505. Cf. the same author's *Rule-Making in the County Courts*, Law Quarterly Rev., April, 1915; *Rule-Making in the Courts of the Empire*, Journal of the Society of Comparative Legislation (July, 1915); *The Rule Committee and its Work*, Law Magazine & Rev. (London) Feb., 1915. See also Higgins, *English Courts and Procedure*, American Judicature Society Bulletin, XI.

Sec. 119 of the China and Corea Order in Council (1904) provides that "The Judge of the Supreme Court may make Rules" and in pursuance thereof a rather extensive procedural code was promulgated in 1905. See Kennett, *China Rules of Court* (Shanghai, 1918).

96. "Legislated procedure has brought with it a train of evils. It violates the fundamental principle of separation of powers. It tends to restrict and belittle the courts. It hopelessly divides responsibility for administering justice. It makes courts dependent upon inexperience in rule drafting. It exalts mere procedural rules to the realm of substantial rights, thus multiplying the number of issues to be tried, and making our litigation more and more an inquisition into non-essentials." Journal of the American Judicature Society, 1, 17.

97. "Procedure Through Rules of Court," *Id.*, where it appears that many state legislatures have already sanctioned it.

and amend all rules." ⁹⁸ It was the writer's privilege in 1917 to attend the session of the board of directors of this most beneficial organization at which the final draft of proposed model "Rules of Civil Procedure" ⁹⁹ was under discussion. These are now practically completed and are of the greatest service in drafting the new rules for American Courts in China.

For it is the writer's cherished purpose to prepare and promulgate such rules and it seems extremely fortunate that the State Department's confirmation of the authority to do so coincides in time and tenor with the growing professional sentiment already noticed.

Acting under this authority the writer has already promulgated Rules for Admission to practice in all of these Courts ¹⁰⁰ and has sent out for comment and suggestion, before promulgation, a draft of proposed Rules of Evidence ¹⁰¹ which aim to cover that subject in brief space. So far as the growing business of the Court will permit, it is the writer's intention to follow these with successive drafts of rules on various procedural subjects until the whole field of remedial law is completed. The full realization of that plan may have to be deferred for some time but it will be pursued as steadily as conditions allow; for the opportunity is unique and the task inviting.

98. American Judicature Society Bulletin, VII, 137.

99. See Bulletin XIII and supplements.

100. Millard's Review, IV, 68.

101. *Id.*, I, 164-168, 192-196; American Bar Association Journal, IV, 218-242.

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